

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481

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In the Matter of:

DELPHI CORPORATION, ET. AL

Debtors.

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United States Bankruptcy Court

One Bowling Green

New York, New York

January 11, 2008

10:30 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

VERITEXT/NEW YORK REPORTING COMPANY

212-267-6868

516-608-2400

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2 SUFFICIENCY HEARING re Debtors' Objection to Proofs of Claim
3 Nos. 14070 and 14245 Pursuant to Debtors' (i)Third Omnibus
4 Objection (Substantive) Pursuant to 11 U.S.C. Section 502(b)
5 and Fed. R. Bankr. P. 3007 to Certain (a)Claims with
6 Insufficient Documentation; (b)Claims Unsubstantiated by
7 Debtors' Books and Records;; and (c)Claims Subject to
8 Modification and (ii)Motion to Estimate Contingent and
9 Unliquidated Claims Pursuant to 11 U.S.C. Section 502(c).

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25 Transcribed By: Lisa Bar-Leib

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1 P R O C E E D I N G S

2 THE COURT: Okay. Good morning. Delphi Corporation.

3 MR. LYONS: Good morning, Your Honor. John Lyons on
4 behalf of Delphi. And here in the courtroom with me, I have
5 Tom Matz and Lisa Diaz from Skadden and Karen Kraft and Dean
6 Unruh from Delphi. Your Honor, all the matters are uncontested
7 except for one. I do have a chart of the uncontested ones for
8 your review so you can see the numbers so we can pass through
9 those quickly.

10 THE COURT: Okay. That's fine if you want to hand
11 that up.

12 MR. LYONS: And as we did yesterday, Your Honor, I'm
13 happy to respond if you have any questions to the uncontested
14 stipulations that are on the agenda.

15 THE COURT: Well, again, the stipulations themselves
16 list the amounts at issue.

17 MR. LYONS: Just the amount at issue, yes.

18 THE COURT: Let me just look at your chart here.

19 MR. LYONS: And in the instance of AIG, there is a
20 capped estimate. So it's not an allowed amount, it's just an
21 estimated amount.

22 THE COURT: Okay. All right. So I'll review those
23 stipulations shortly and confident they'll be signed.

24 MR. LYONS: Okay. Thank you, Your Honor. With that,
25 we have the Lightsource matter and I'll yield the podium to

1 counsel for Lightsource.

2 MR. MURPHY: Good morning, Your Honor. Lawrence
3 Murphy of Honigman Miller Schwartz and Cohn. I'm here on
4 behalf of Lightsource Parent Corporation and Guide Corporation
5 claimants in this matter.

6 THE COURT: Good morning.

7 MR. MURPHY: Your Honor, we're here today on a
8 sufficiency hearing on the claims submitted by Guide and
9 Lightsource. This was noticed by Delphi and based on papers
10 arguing that a no-third party beneficiary's clause in a master
11 separation agreement somehow bars the claim asserted here.
12 Again, it's a sufficiency hearing so the standard is similar to
13 a motion to dismiss. We believe, Your Honor, that's a high
14 burden for Delphi to establish. We believe there's more than a
15 sufficient basis to a claims objection hearing and through
16 discovery of this matter.

17 To start, Your Honor, the argument made by Delphi
18 essentially asks the Court to look at a -- just one piece of
19 what's a rather simple jigsaw puzzle to put together. And that
20 piece would be like a monochromatic border piece. And they're
21 saying take this piece and this is what the agreement says.
22 It's not the correct way to interpret the master separation
23 agreement. The clear provisions of the agreement when read
24 together established that Delphi assumed the obligations of
25 General Motors under the Lightsource formation agreement

1 attached as Exhibit A to our submission.

2 Your Honor, let's begin by the little bit of history.

3 The master separation agreement was dated December 22, 1998.

4 Shortly before that, on September 29th, 1998, the Lightsource

5 formation agreement was entered between General Motors and

6 Lightsource. Under that agreement, the business of Guide was

7 divested from GM. Guide was part of the Delphi Automotive

8 Group of companies within General Motors. But it was divested

9 before the master separation agreement was entered into two

10 months beforehand. That agreement, in paragraph 14.3, states

11 that it "shall be binding upon and inured to the benefit of

12 each of the parties and their respective successors and

13 permitted assigns". 14.3 also provides in the formation

14 agreement, Your Honor, that "GM may assign without prior

15 consent of Lightsource Guide any or all of its rights,

16 interests and obligations under the Lightsource agreement if

17 those interests are transferred to a corporation or other

18 business entity to which all or substantially all of the assets

19 of Delphi Automotive is sold or transferred". Clearly, at the

20 time of the LFA, there was a contemplation by GM that it was

21 going to divest that group of companies and it gave itself the

22 right to unilaterally assign its obligations under the LFA to

23 Delphi. Just historical information that's relevant here.

24 The master separation agreement, again, when read --

25 its provisions are read as a whole, very simply establish that

1 that agreement is a divestiture agreement that was specifically
2 recognized and assumed by Delphi here in the MSA. And that is
3 as -- I don't want to repeat everything in the brief, Your
4 Honor, but I do think it's important to look at Section 2.02 of
5 the MSA where under "Assumption of Liabilities", there's a
6 provision relating to divested businesses. And it says that
7 Delphi "shall with respect to the businesses and operations
8 divested by the automotive systems business assume all
9 liabilities of GM related thereto".

10 Now looking at the definition section earlier in the
11 MSA, Your Honor, and this is important, the Delphi Automotive
12 Systems business includes businesses that were divested by GM
13 owners -- means, the business -- I'm sorry, let me just read
14 from the agreement. "Delphi Automotive Systems business means
15 the business conducted by the Delphi Automotive Systems sector
16 of GM at any time on or before the contribution date." That is
17 the date of the agreement. And under subparagraph 3 in that
18 definition, it states that "all business operations that were
19 conducted at any time in the past by the Delphi Automotive
20 Systems sector of GM or by any predecessor of such sector but
21 were discontinued or disposed of prior to the date of the
22 Delphi financial statements other than by transfer or
23 disposition to any other sector of GM."

24 So, clearly, Guide was a divested business of this
25 group prior to the date of this agreement. It was

1 contemplated -- it's part of the definition of that agreement.
2 And there is also a definition of the Liabilities with a
3 capital L in the "Divested Business" section under the
4 "Assumption of Liabilities" in 2.02. It says that "Delphi
5 shall assume all of the liabilities and they shall include
6 without limitation the obligation to satisfy all of the
7 obligations of GM under the various agreement pursuant to which
8 the Delphi Automotive Systems business effected such
9 divestitures." And that's defined as a divestiture agreement.

10 Again, Your Honor, the definitional section a couple
11 of pages earlier defines those liabilities that were assumed by
12 Delphi to include -- and it's a very broad definition of any
13 and all liabilities and it includes the word "contract" right
14 in there. So in Section 2.02 where there's an "Assumption of
15 Liabilities", it relates to the Delphi Automotive divestiture
16 agreements. It relates to liabilities which is defined as
17 contracts of General Motors relating to those businesses. And
18 there's a clear contemplation of an assignment of that
19 agreement and its liabilities.

20 In addition, there was an employee matters agreement
21 entered into between GM and Delphi which is attached to our
22 filing for this sufficiency hearing as Exhibit B, which under
23 Section paragraph 3(a), Your Honor, it states that "for
24 employees who are to become Delphi employees or Delphi-
25 terminated employees as of the effective time, Delphi, except

1 as set forth in Schedule I of the MSA and/or Delphi benefit
2 plans, shall assume all employment related responsibility,
3 obligation or liability of GM regardless of when incurred
4 except as expressly stated in this paragraph 3(a)." Now
5 that -- the Delphi-terminated employees are defined in the U.S.
6 Employee Matters Agreement as an individual who is not
7 currently a Delphi employee but whose last employment in the GM
8 controlled group of corporations was with Delphi, a Delphi
9 business unit or a Delphi business unit controlled or
10 associated business.

11 Your Honor, what we had here was a divestiture of the
12 Delphi group of corporations from General Motors back in
13 December of 1999. It was contemplated that the split would
14 result in Delphi being responsible for the business and
15 liabilities of Delphi's businesses including Delphi businesses
16 that had been previously divested by GM out of that group. So
17 that included Guide. And it was clearly contemplated for in
18 the agreement in both the sections of the agreement, the
19 definitions of the agreement and in a separate employee matters
20 agreement. There was an absolute clear intent by the parties
21 for Delphi to assume the liabilities of that contract. And as
22 I cited to the Court earlier, that contract, the Lightsource
23 formation agreement, says that it shall be binding upon and
24 inured to the benefit of the successors and the permitted
25 assigns.

1 THE COURT: Well, was the contract assigned or was it
2 simply assumed? Or does it matter? Is there a distinction
3 between those two terms.

4 MR. MURPHY: I think actually the language is an
5 "assumption" of the contract, Your Honor. They assumed all
6 liabilities of that contract. And they did not agree --
7 there's no agreement to reimburse GM for the cost related to
8 those things. They assumed the contracts by the terms of the
9 separation agreement.

10 THE COURT: And they allocated responsibility for
11 paying pursuant to Schedule I which listed the Lightsource
12 agreement?

13 MR. MURPHY: Correct, Your Honor. It is named there
14 as well. I mean, it was clearly in the contemplation of the
15 parties. It was an agreement that was there that Delphi had to
16 consider and review as part of its due diligence. And it
17 expressly agreed to assume the obligations under that contract.
18 And those obligations included the OPEB reimbursement
19 liability. To accept the argument being made here at the
20 sufficiency hearing that simply a no third party beneficiary
21 boiler plate clause obviates its responsibilities to divested
22 businesses would undercut specific and clear provisions in the
23 contract, multiple provisions in these agreements that relate
24 to the separation of GM and Delphi.

25 That, Your Honor, is the crux of the claims here. I

1 think there's more than a sufficient basis for finding that
2 this matter should proceed to a claims hearing and through
3 discovery.

4 THE COURT: Well, let me go to that statement just
5 made which is that 9.05 is simply a boiler plate provision that
6 should be overridden by the specific assumption of
7 responsibility to pay for the obligations of GM to Lightsource.
8 Why would be overridden by the references to the Lightsource
9 formation agreement?

10 MR. MURPHY: It would be overridden because it would
11 render those provisions a nullity. The idea here is --

12 THE COURT: Why would it render them a nullity?

13 MR. MURPHY: Because --

14 THE COURT: I mean, if GM doesn't receive -- if GM
15 receives notice that Delphi isn't paying Lightsource, can't it
16 enforce this agreement because Lightsource will go after GM,
17 won't it?

18 MR. MURPHY: I think that --

19 THE COURT: GM is still responsible to Lightsource,
20 in other words.

21 MR. MURPHY: GM had the right unilaterally, under the
22 Lightsource formation agreement, to without consent of Guide to
23 assign those obligations to Delphi. It's a specific provision
24 in that agreement.

25 THE COURT: But is -- so Lightsource takes the view

1 that GM's not responsible for payment of OPEB?

2 MR. MURPHY: Lightsource has not made a claim against
3 General Motors for those. And I --

4 THE COURT: I mean, the general rule is that an
5 assignor is still liable if it makes an assignment.

6 MR. MURPHY: And if General Motors --

7 THE COURT: And I don't think paragraph 14.3 changes
8 that general rule or modifies that general rule. It just says
9 that GM can do that.

10 MR. MURPHY: Your Honor, if General Motors remains
11 liable under that contract, it still does not alleviate
12 Delphi's responsibility as the assignee of those obligations.

13 THE COURT: No, but the question is to whom.

14 MR. MURPHY: To the other contracting party --

15 THE COURT: But that's GM.

16 MR. MURPHY: -- which was, in this case, Lightsource.

17 THE COURT: Well, but the contracting party is GM,
18 isn't it? That's where -- I mean, I'm going back to your
19 statement that 9.05 would render a nullity the assumption of
20 liability language.

21 MR. MURPHY: It would allow Delphi to escape having
22 to live up to what it expressly agreed to in those provisions.
23 I mean, what the Court is --

24 THE COURT: But let me ask you that. Why is that? I
25 mean, you -- Lightsource has filed a claim in Delphi's

1 bankruptcy case as a result of the fact that it has not been
2 paid for certain OPEB. And, you know, they're asserting it has
3 an unliquidated claim for contingent breach going forward. GM
4 filed a claim in Delphi's bankruptcy case based upon the master
5 separation agreement and Delphi's failure to pay, among other
6 things, this obligation to Lightsource which Delphi undertook
7 to assume under the master separation agreement. So GM will
8 collect on that claim under Delphi's theory of this motion or
9 this claim objection. And Lightsource not only will get or
10 keep its claim against GM, but GM will be financially
11 recompensed for the very liability that Delphi assumed by the
12 liability to pay Lightsource.

13 MR. MURPHY: Your Honor, the evidence relating to
14 General Motors and the scope of General Motors' claim were not
15 raised in connection with this sufficiency hearing. I cannot
16 tell you specifically if General Motors made a claim under the
17 Lightsource financial agreement to -- in this proceeding. I'm
18 representing Guide and Lightsource and that was not raised --
19 what Your Honor just mentioned was not raised as part of the
20 basis for a sufficiency by Delphi here today. Even if it were
21 a correct statement, the case law cited in our response to
22 Delphi shows that when an assignee agrees to assume any
23 obligations, a direct obligation by the assignee to Lightsource
24 arose.

25 THE COURT: But again, that goes to my question. Is

1 Delphi really the assignee? Was there anything to assign here
2 or did it simply assume the obligation?

3 MR. MURPHY: They assigned the contract and the
4 obligations under that contract to Delphi. Your Honor, the
5 purpose --

6 THE COURT: Well, what contract was assigned?

7 MR. MURPHY: The Lightsource financial agreement.
8 The --

9 THE COURT: And where does that say that in the
10 master separation agreement?

11 MR. MURPHY: It is in the definition of -- Section
12 2.02(b) "Divestiture Agreements".

13 THE COURT: But isn't that an assumption of
14 liabilities under the agreements? I'm not -- I'm raising this
15 to you 'cause I'm not sure whether in fact it makes a
16 difference but I don't -- I mean, this is a little different
17 than a case where Delphi is getting anything other than a
18 liability. This is a case where Delphi is just getting a
19 liability under this contract, right? Are they getting an
20 assignment of anything?

21 MR. MURPHY: Here's where -- here, Your Honor, is
22 what happened was General Motors and Delphi were parting ways.
23 There was an agreement put into place, the master separation
24 agreement, which was to split these two companies apart, not
25 keep them together and there was a definition of what's going

1 into the Delphi camp and what's staying with General Motors.
2 Now here the OPEB obligations, these employees were deemed
3 under these agreements, including the employee matters
4 agreement, by definition, to be former Delphi employees. So
5 what the deal was, Your Honor, is that this is a simple math
6 number. If somebody had ten years of seniority with Delphi
7 before the Guide/Lightsource formation agreement and that
8 person stayed at Guide for another ten years, there would be a
9 fifty/fifty split because of the accrued benefits for the first
10 ten years while it was still a Delphi employee. So what
11 General Motors and Delphi agreed to here was you're responsible
12 for the accrued benefits of your former employees. And Delphi
13 said we will take on that responsibility as defined in this
14 agreement. They did not agree to reimburse GM; there's no such
15 language to that effect. There was a split of these companies
16 and their responsibilities relating to the Delphi Automotive
17 Group whether it was as existed at that time or as it related
18 to businesses that had been divested from that group prior to
19 their agreement.

20 THE COURT: No, I know. But I'm going back just
21 simply to the proposition that you stated in your supplement
22 where you cite Corbin, where you say that the assignee of a
23 contract who assumes the liabilities under a contract takes
24 those liabilities. And I guess -- I don't see a contract being
25 assigned here. I just see an assumption of liabilities.

1 MR. MURPHY: Okay. If you look under the definition
2 of Liabilities, capital L, in the master separation agreement,
3 it includes -- it says the word "contracts" right in there.

4 THE COURT: No, but liabilities under the contracts.

5 MR. MURPHY: Your Honor, I guess I don't read it that
6 way. But let me look at the --

7 THE COURT: Well, liabilities is by definition an
8 obligation. It's not an asset. A contract is an asset.

9 MR. MURPHY: Right. And so they agree to assume all
10 commitments and obligations arising out of any contract.

11 THE COURT: No, I understand that.

12 MR. MURPHY: Okay. And the --

13 THE COURT: I'm just going to the citation of the
14 case law now. And --

15 MR. MURPHY: And the case law I cited, Your Honor,
16 includes language "an assignee of a contract who assumes the
17 obligations of a contract imposed on the assignor becomes
18 directly liable on the contract to the other contracting
19 parties".

20 THE COURT: I know. And the point of that is to vary
21 the general rule which is that when you assign a contract and
22 there's not an assumption, you're only taking liabilities going
23 forward not retroactively. But it all is premised upon the
24 assignment of a contract. And ongoing executory contract where
25 there's performance on both sides. Here, Delphi just assumed a

1 liability because there wasn't anything to perform going
2 forward by both parties. It's just -- you know, we assumed the
3 liability. So I guess the question is how are those cases
4 really relevant. I mean, I think what Corbin again is talking
5 about there is explaining an exception to the general rule
6 which is when you take an assignment without extra language,
7 just like when you buy a business without extra language,
8 you're only taking on the obligations after the closing date.

9 MR. MURPHY: Unless agreed otherwise which is what
10 they did here.

11 THE COURT: But they didn't have an assignment. I
12 guess that's my -- that's my point. I think the cases -- it's
13 kind of apples and oranges. The proposition that he states in
14 Section 9.06 of this treatise is really dealing with a
15 different legal issue which is what is the status or what is
16 the obligation of the assignee of a contract.

17 But that being said, I guess the ultimate point is,
18 and maybe this is why this is irrelevant, doesn't that case law
19 even if you say that you are an assignee -- let's assume for a
20 moment that Delphi was an assignee here as opposed to just
21 agreeing to take liabilities. Whether or not they take on the
22 liabilities going forward depends upon the language of the
23 contract. And whether they assume and how they assume that
24 responsibility -- and I guess that's what I want to focus again
25 on on 9.05. Why is 9.05 again trumped by the other specific

1 references to the obligations under the Lightsource formation
2 agreement?

3 MR. MURPHY: Because read -- as I stated earlier,
4 when you put the pieces all together, you go from the
5 provisions and the definitions of these agreements, it is clear
6 that they were going to be responsible for the former divested
7 businesses of Delphi group. To read the --

8 THE COURT: Well, I understand they're going to be
9 responsible for it. The question is to whom. And doesn't 9.05
10 say we're going to be responsible for it but not to any third
11 party?

12 MR. MURPHY: Well, first of all, Your Honor, if that
13 were the case, the contract would have said that. It wouldn't
14 have said they will assume all liabilities. It would have said
15 we will reimburse General Motors for all liabilities arising
16 out of.

17 THE COURT: But why --

18 MR. MURPHY: That's not what the contract says.

19 THE COURT: But why do they have to say it that way?
20 Why can't they simply say it this way as opposed to setting up
21 an indemnification mechanism?

22 MR. MURPHY: Because I think the intent of the
23 parties which arises from looking at all of the definitions and
24 the provisions in both the employee matters agreement and the
25 master separation agreement makes it clear it would -- the

1 intent was to break apart General Motors and the Delphi
2 Automotive business. So all of the definitions relating to
3 what that business is talks about the current and former
4 business units of Delphi and the current and former employees
5 of Delphi. So Delphi, had it divested Guide after the master
6 separation agreement, there wouldn't be any argument. It would
7 have been clearly a Delphi spin-off business and it would have
8 been responsible for whatever the contract between Delphi and
9 that Guide would have been. But here, there was a
10 contemplation that Guide had already been spun off. Delphi
11 knew that, acknowledged it in the agreement and agreed -- the
12 parties agreed to treat it as if it had been separated as part
13 of the Delphi master separation agreement. That's the intent
14 of the parties that it's clear from all of the definitions to
15 look at the employee matters agreement and its definitions and
16 the master separation --

17 THE COURT: But if that were the case, why didn't GM
18 go to Lightsource or Guide and say we want you to agree that
19 after this closing of the master separation agreement, you will
20 look solely to Delphi.

21 MR. MURPHY: Well, it, in effect, did by preserving
22 the unilateral right -- when you look at the Lightsource
23 formation agreement, Your Honor, it says that the permitted
24 assigns agree to become obligated under that contract. That's
25 language we can't forget about here. If, you know, they

1 assumed those obligations of that contract -- look to that
2 contract and see what it says. It says that the people to whom
3 this is assigned are liable under that contract. Now GM, at
4 that time, told Guide by the way, you know, you've got a right
5 to say no except if we transfer this to the Delphi Automotive
6 Group as part of the divestiture which was ongoing at the time.
7 So GM did in effect tell Lightsource at the time this was
8 happening and going to happen to this agreement.

9 THE COURT: But it didn't -- but are you contending
10 that that paragraph, paragraph 14.3 of the LFA absolves GM of
11 any liability to Lightsource?

12 MR. MURPHY: Your Honor, I'm not taking a position as
13 to whether or not -- whether it does or not. The point here is
14 that it doesn't absolve Delphi. If there's two avenues of
15 recovery against two different potential parties, that doesn't
16 mean it inures to Delphi's benefit.

17 THE COURT: No, I understand that. But I'm trying to
18 see how this relates to your statement that it's clear from
19 this set of transactions that the purpose of the master
20 separation agreement, the intent of the parties, was to
21 separate Delphi from GM including in respect of this business
22 which was transferred shortly before the separation. And I'm
23 having a hard time seeing why that's dispositive on the point
24 of saying that it's clear that Lightsource would have a direct
25 claim against Delphi under this agreement. I could see a

1 little more cogency to that argument if in fact the separation
2 was such that GM would have no liability to Lightsource but
3 that doesn't seem to be the case.

4 MR. MURPHY: I don't -- GM could very well make that
5 argument, Your Honor. If Guide brings a claim against General
6 Motors, they very well could make that based on that provision.
7 But I'm not going to stand here and tell you that that argument
8 going to succeed against my client. I don't know. But there
9 is clearly an argument that General Motors could make, that at
10 the time of the Lightsource formation agreement, Guide, you
11 knew we were going to assign this contract. You knew this was
12 going on. This was a major deal. Delphi was an ongoing thing
13 that was consummated two months later and we reserved the right
14 to without your prior written consent to sign this contract.
15 And you agreed to it, Guide. Now that's an argument that GM
16 could make. I'm not saying it's a winner clearly on the record
17 here, Your Honor, but that's an argument that could be made to
18 prevent or Lightsource from getting any recovery. And what I'm
19 asking the Court to do is -- you know, I think the parties
20 agree under the general construction of contract law here is to
21 take a look at the contract as a whole. All of the provisions
22 of the master separation agreement, the Lightsource formation
23 agreement and the employee matters agreement and give them a
24 fact where it was clear that these businesses were going their
25 separate ways. That is part of the deal that got benefits and

1 liabilities. Delphi received benefits and liabilities. And
2 this was just one piece of it. But it was clear that by the
3 intent of the parties of the contract that divested businesses
4 and divestiture agreements were going to go over to Delphi.
5 And that's why that language appears in there. And if Delphi
6 can just sit back and go oh, no, no, no, we didn't really take
7 any of that stuff on, all the previously divested businesses,
8 well, those are third parties, we really don't have to do
9 anything. You have to go back to GM for that. That renders
10 all of those provisions really surpluses and gives benefit to a
11 boiler plate.

12 THE COURT: Well, that I don't understand. I mean,
13 if you have a right against GM, why are they surplusage?

14 MR. MURPHY: I think that Guide could make a claim
15 against GM, Your Honor, but I don't know if it will be
16 successful based on the transfer.

17 THE COURT: No, I understand that. But if in fact
18 Lightsource or Guide -- and, just for the record, I want to
19 make sure, they're not two claims here. Whoever has the claim
20 has the claim.

21 MR. MURPHY: Correct, Your Honor.

22 THE COURT: All right.

23 MR. MURPHY: It's -- what happened was Lightsource
24 assigned

25 THE COURT: Right.

1 MR. MURPHY: -- the claim to Guide. And if there was
2 a stipulation to one way or the other, one of the claims would
3 go away.

4 THE COURT: Okay. But if, in fact -- and I'll just
5 use the word "Lightsource" instead of "Guide".

6 MR. MURPHY: Okay.

7 THE COURT: If Lightsource has -- still has a claim
8 against GM, then it seems to me that the argument goes by the
9 boards then that you have to interpret the agreement as
10 switching and giving Lightsource the right to sue Delphi
11 directly because it'd be out of luck, it couldn't sue GM
12 anymore.

13 MR. MURPHY: And GM may make that argument, Your
14 Honor. And then we would be left without a remedy. And the
15 point here, Your Honor, is that there is ample case law
16 supporting the proposition that Delphi is obligated directly to
17 Lightsource under that case law by expressly assuming that
18 contract.

19 THE COURT: But don't you have to look at the terms
20 of the contract in each case to see what was specific, what was
21 general and the like?

22 MR. MURPHY: Yes. And the point in many of the cases
23 that we've cited in the Court is that these specifics should
24 govern the general. Many contracts include this boiler plate
25 language. It could have applied to any number of things. You

1 know, other suppliers who are supplying parts or contractors
2 who are providing services to these plants, any number of third
3 parties that are out there so that this third party boiler
4 plate language appears in many contracts.

5 THE COURT: Well, let's look at 9.05 then.

6 MR. MURPHY: Okay.

7 THE COURT: And in particular, what do you make of
8 the last clause of it? The one that reads "except for Article
9 V which is intended to be for the benefit of the persons
10 provided for therein and may be enforced by such persons".
11 Isn't that a specific limitation on 9.05?

12 MR. MURPHY: It is.

13 THE COURT: So doesn't that pretty clearly suggest
14 that that's the only specific limitation on 9.05 since it's
15 right in there, "Except for"?

16 MR. MURPHY: Again, Your Honor, if there was -- it is
17 a limitation on 9.05, clearly. And it relates to
18 indemnification. And it still -- whether it was a
19 draftsmanship issue or otherwise, there are still obligations
20 under this agreement that were assumed by Delphi that were not
21 indemnification obligations. All of the divestiture
22 agreements, the liabilities and everything else were taken by
23 Delphi to -- to say that they've got -- you know, look to GM
24 for all this stuff is clearly contrary to what the intent was
25 when they separated these businesses. GM did not intend --

1 THE COURT: But how do I see that from the contract?

2 MR. MURPHY: Because of the definitions, Your Honor.

3 There was a -- the parties recognized that Delphi had business
4 units that had been previously divested by General Motors and
5 it specifically agreed that those liabilities, along with the
6 liabilities of the existing Delphi business, would be split off
7 onto the Delphi table.

8 THE COURT: But isn't this pretty much on all fours
9 with the Nationwide case?

10 MR. MURPHY: No. The Nationwide case, Your Honor, is
11 -- we don't know what the specifics of the contract were,
12 number one.

13 THE COURT: Well, they cite -- they describe the
14 language. In fact, Nationwide was a party to the contract.

15 MR. MURPHY: All right. And what that language says,
16 Your Honor, in the Nationwide case, is that Nationwide could
17 not pay to its insureds directly without the prior written
18 consent of the party that had agreed to reimburse it. So there
19 was a difference in that contract.

20 THE COURT: Well, did that have any bearing on the
21 Court's ruling whatsoever? Didn't the Court simply quote the
22 third party beneficiary language?

23 MR. MURPHY: Your Honor, it wasn't faced with this
24 case. My point, Your Honor, is the contract was different.
25 And the difference is --

1 THE COURT: But how is it different? I don't
2 understand.

3 MR. MURPHY: It's very important here because that
4 contract contemplated Nationwide remaining liable to the
5 insureds. And the party who accepted that obligation said to
6 Nationwide you have to talk to us first. If you want to come
7 to us for reimbursement, before you pay those people, you have
8 to get our permission. So there was a contemplation by the
9 parties in the contract in that case that Nationwide would
10 remain responsible.

11 THE COURT: But --

12 MR. MURPHY: There is no -- there's nothing similar
13 to that at all here.

14 THE COURT: Did that point get discussed at all by
15 the second circuit?

16 MR. MURPHY: It wasn't relevant to that case. It's
17 relevant here.

18 THE COURT: But if it's -- I would think it would be
19 because you're just saying that that's what was guiding them as
20 opposed to the language that they did rely on which is exactly
21 the same language that's here except that language didn't have
22 the exception I just quoted.

23 MR. MURPHY: Well, to begin with, we have to look at
24 this contract governs this case.

25 THE COURT: Right. No, I agree with that.

1 MR. MURPHY: And that case appears to be -- can be
2 argued as similar to this case. But so can -- and that's not a
3 precedent to this case is -- New York law decided by a
4 different circuit.

5 THE COURT: I understand.

6 MR. MURPHY: We've cited opinions from Delaware and
7 otherwise it could also be argued the same where there were --
8 what the Courts held in our cases was that the specific
9 provisions overrode the boiler plate general. So what my point
10 is with respect to Nationwide --

11 THE COURT: But let's turn to those --

12 MR. MURPHY: -- is it's distinguishable.

13 THE COURT: -- okay? I want to make sure I'm --
14 we're focusing on that.

15 MR. MURPHY: Okay. We're looking at the Nationwide
16 case?

17 THE COURT: Well, no. I want to go to the cases
18 you're relying on.

19 MR. MURPHY: Okay.

20 THE COURT: The main one, I guess, is the Caldwell
21 Trucking case, right, the third circuit one? Now maybe
22 that's -- I mean, I thought that was the main one you were
23 relying on but -- although that's not -- not Delaware law
24 either. It's New Jersey law. But that's the one where the
25 Court made the distinction between the specific language of the

1 contract and the general language of the -- of successors and
2 assigns. No other parties are deemed to beneficiary. And
3 there, I think -- I mean, this is on page 18 after quoting that
4 language, the third circuit said "The general boiler plate
5 language, however, must yield to the specific direction of
6 paragraph 1.05 that anything contained herein to the contrary
7 notwithstanding, i.e., notwithstanding the boiler plate
8 language, Pullman agrees to assume." And I think that's
9 missing from the master separation agreement. That cross-
10 referenced "anything herein to the contrary notwithstanding".
11 So I'm not sure -- I mean, are there other cases where, you
12 know, absent some language like that, the third party
13 beneficiary language doesn't apply?

14 MR. MURPHY: Well, I think that the divestiture
15 agreement here, the master separation agreement, is unique. I
16 didn't find any case law that had -- nor did Delphi, I believe
17 -- that had exactly the same language in this as we have in
18 this case.

19 THE COURT: Right.

20 MR. MURPHY: But my point, Your Honor, is that
21 multiple provisions of the contract when read plainly support
22 our position. And for purposes of a sufficiency hearing, we
23 meet that burden.

24 THE COURT: But let's go through that again. Why is
25 that? I want to make sure I understand why they support your

1 position.

2 MR. MURPHY: If there was no intent by General Motors
3 to push -- put that liability over to Delphi, why would there
4 be a definition that expressly includes "previously divested
5 businesses"?

6 THE COURT: No, I understand that they intended --
7 it's very clear that they intended Delphi to be responsible for
8 paying that liability.

9 MR. MURPHY: Right. And through -- and I'm sorry,
10 throughout the MSA and its attachments, they're very clear, you
11 know, you're going to pay us back if this happens or you'll pay
12 us back if that happens. And there's a delineation of those
13 things. But in these cases with respect to those businesses,
14 there is not a specific General Motors is going to pay these
15 and you have an obligation to reimburse us. It was simply --
16 it's almost as if they're going to argue that General Motors
17 continued to maintain some responsibility to the core Delphi
18 business that was spun off at that time.

19 THE COURT: Okay.

20 MR. MURPHY: And here --

21 THE COURT: Well, wait, let's stop there 'cause I
22 want -- this is an important point. You're saying that -- let
23 me turn to it. You're saying that there are other provisions
24 of the agreement pursuant to which Delphi, instead of assuming
25 a liability, indemnified GM for a liability?

1 MR. MURPHY: I think that they -- in the divested
2 business at the end, they talk about a Schedule I which doesn't
3 relate to this -- the OPEB reimbursement.

4 THE COURT: I'm sorry, let me -- where are you now?

5 MR. MURPHY: I'm sorry, Your Honor. MSA Section
6 2.02, Assumption of Liabilities.

7 THE COURT: Okay, right.

8 MR. MURPHY: "Responsibility for certain obligations
9 relating to certain divestitures shall be allocated between the
10 parties as set forth in Schedule I."

11 THE COURT: Right.

12 MR. MURPHY: So there was some specific obligations
13 retained as defined in Schedule I. So it was contemplated
14 that --

15 THE COURT: Right. But Schedule I lists the LFA as
16 going to Delphi.

17 MR. MURPHY: It lists the LFA as going to Delphi.
18 But I think Schedule I speaks to other obligations than the --
19 they're going to handle certain aspects of the LFA differently
20 than the transferred obligations.

21 THE COURT: Well, where -- let me make sure -- I --
22 as far as Schedule I is concerned, that says that Delphi shall
23 not assume or Delphi shall assume -- it doesn't talk about
24 indemnification.

25 MR. MURPHY: Okay. And so what they would argue is

1 using their -- they would argue Schedule I is a nullity then
2 because there'd be some third party beneficiary there. I mean,
3 I just --

4 THE COURT: No, I don't follow that.

5 MR. MURPHY: I guess the point is is that the
6 divested assets, the OPEB obligations, went to Delphi. And
7 there was a specific consideration of those in Schedule I --

8 THE COURT: No. They'll agree with you on that.
9 Delphi is liable for those obligations. The question is liable
10 to whom.

11 MR. MURPHY: And if they -- they're liable to Guide
12 because they expressly assumed those obligations.

13 THE COURT: No, but what in the agreement shows that?

14 MR. MURPHY: Section --

15 THE COURT: You're saying that if you look at the
16 agreement as a whole --

17 MR. MURPHY: Right.

18 THE COURT: -- which obviously I'm supposed to, what
19 shows me that it is an obligation not to GM but to Lightsource?

20 MR. MURPHY: Well, okay. "The liabilities assumed by
21 Delphi shall assume without limitation the obligation to
22 satisfy all of the obligations of GM under the various
23 agreements." Now the obligation of GM under the Lightsource
24 agreement was to pay Guide, to pay Guide. That's the
25 obligation they assumed. They assumed it; it was there. They

1 had the agreement. They could read it for themselves. The
2 agreement, the LFA itself, says that an assignee is liable
3 under that agreement and this says they're liable. What was
4 the obligation of GM? The obligation of GM was to pay the OPEB
5 obligations for the period of time that these people were
6 employees prior to the divestiture.

7 THE COURT: Okay, but --

8 MR. MURPHY: So they assumed those liabilities.

9 THE COURT: That's fine. There's an obligation to
10 pay. That's the nature of the obligation is to pay --

11 MR. MURPHY: To pay Guide.

12 THE COURT: To pay Guide.

13 MR. MURPHY: GM didn't -- right. So the point --

14 THE COURT: So if Guide isn't paid, GM enforces this
15 agreement.

16 MR. MURPHY: If GM accepts responsibility to
17 Lightsource.

18 THE COURT: Right.

19 MR. MURPHY: Which is a presumption that I think is
20 really beyond the scope of this proceeding. We have an
21 agreement where Delphi agreed -- I mean, there might be two
22 sources of recovery. But the point is is that under this
23 agreement --

24 THE COURT: No. Again, I'm just trying to -- I'm
25 trying to see, again, what provisions of this agreement make it

1 clear that the party to enforce the agreement is not only GM
2 but also Lightsource?

3 MR. MURPHY: There is no specific provision that says
4 Lightsource can sue Delphi. Certainly, Your Honor --

5 THE COURT: Right.

6 MR. MURPHY: -- and I'm not going to make that
7 argument. What the agreement clearly states, though, is that
8 they assumed these contracts. They stepped in as General
9 Motors, as a party to those contracts. They became responsible
10 for the previously divested business units. So they are
11 responsible directly to Guide. I mean, it's to --

12 THE COURT: Well, I guess that's the step that I'm
13 missing --

14 MR. MURPHY: Well, the step is supported by --

15 THE COURT: -- particularly in light of 9.05.

16 MR. MURPHY: Right. Well, the path is laid in
17 Section 2.02. Delphi, through the definitions of Delphi
18 Automotive Systems business, which I read earlier, the
19 definition of liabilities, and the specific language in the
20 contract they agreed to assume itself and the employee matters
21 agreement which also talks specifically about Delphi-terminated
22 employees. There's a clear intent of the parties --

23 THE COURT: All right. But let me go to one of the
24 main cases you cite, which is this Royal Indemnity Company
25 versus Alexander Industries. It's the Delaware Supreme Court

1 one, 211 A.2d 919. And that was a surety contract where the
2 contractor that would be in Lightsource's position was
3 referenced and the Court says citing -- there were statements
4 on securities -- that where a surety for a contractor -- this
5 is on page 552 -- "where a surety for a contractor or on a
6 construction contract agrees in terms with the owner that the
7 contractor will pay for labor and materials or guarantees to
8 the owner the promise of the contractor to pay for labor and
9 materials. Those furnishing labor and materials have a right
10 against the surety as third party beneficiaries of the sureties
11 contract unless the sureties contract in terms disclaims
12 liability to such persons." And then it goes on to cite this
13 Dravo-Doyle case where it says "the bonds conditions were the
14 same as the present ones but the surety escaped liability
15 because the principal's contract in plain words limited third
16 party beneficiaries to those who had liens." And then they say
17 "we are of the opinion that the majority rule is logical and
18 correct. The surety assumed the contractor's responsibility to
19 perform its contract including payment for material and labor.
20 Clearly, that promise standing alone without limiting language
21 shows an intent to benefit those who've supplied materials and
22 labor." Then they say "we see no injustice in this result
23 especially since the parties" -- that is, the people standing
24 in the shoes of GM and Delphi -- "had they in fact intended the
25 contrary could easily have avoided the result by inserting a

1 few words in the bond itself." And I guess my question is why
2 isn't 9.05 equivalent to those few words?

3 MR. MURPHY: The -- I don't think the -- 9.05 again,
4 Your Honor, is contrary to the specific language from the prior
5 parts of the agreement. To say --

6 THE COURT: But the whole rest of that opinion was to
7 say even though you have specific language, even though the
8 bond refers to the contractor says you'll pay if the -- if it's
9 triggered. And here it would be triggered by the OPEB
10 liability just coming due. You can get around that with a no
11 third party beneficiary's provision.

12 MR. MURPHY: And, in effect, what we're arguing here,
13 Your Honor, is that Delphi is seeking to use that provision to
14 bar all third parties whether intended or otherwise.

15 THE COURT: Right.

16 MR. MURPHY: It's not just a limited exception for
17 certain parties as it was in this case.

18 THE COURT: But how --

19 MR. MURPHY: They're saying everybody.

20 THE COURT: But how is that language ambiguous on
21 that point?

22 MR. MURPHY: Because -- okay. The difference is
23 accepting Delphi's argument would bar everybody from recovering
24 into Delphi.

25 THE COURT: Right.

1 MR. MURPHY: In that Royal Indemnity case, there was
2 a class that was clearly intended to be covered and there was
3 an exception to it.

4 THE COURT: Right.

5 MR. MURPHY: But here they would be rendering a
6 nullity. All of the language of the assumption under the
7 vested business and everything else --

8 THE COURT: But wouldn't that have been the case in
9 the other one, too? I mean, except for the ones who had liens?

10 MR. MURPHY: Well, if they had said we agree to pay
11 everybody in one paragraph and then they relied on this third
12 party provision rendering paragraph 1 of the agreement a
13 nullity, what was the contract?

14 THE COURT: Because it means that the agreement runs
15 just to GM.

16 MR. MURPHY: And that's not the intent of this
17 contract.

18 THE COURT: Why?

19 MR. MURPHY: There's nothing -- because if --

20 THE COURT: In the light of that case law and in
21 light of this provision.

22 MR. MURPHY: If the parties --

23 THE COURT: That's where I don't see. I don't see
24 that.

25 MR. MURPHY: Okay. If the parties intended General

1 Motors to remain responsible for all of its obligations --

2 THE COURT: No. Not responsible. As between them.

3 Not responsible as between them.

4 MR. MURPHY: There is no mechanism in this contract
5 for GM to be reimbursed. Why would there be multiple millions
6 of dollars of liabilities that General Motors is going to stay
7 on the hook for and not express -- if the parties intended
8 something that vast --

9 THE COURT: But why wouldn't they be -- you don't
10 have to be reimbursed. You just sue for breach of contract.
11 You didn't pay. You agreed to pay. You assumed my liability.
12 You breached that contract. It's a simple contract claim. You
13 don't have to worry indemnity law or contribution law. It's a
14 breach claim. And I'll give you one consequence. Instead of
15 under 502(e) of the Bankruptcy Code where contribution and
16 indemnity claims are disallowed until they become liquidated,
17 you could say this is a breach claim. You breached the
18 contract.

19 MR. MURPHY: Delphi --

20 THE COURT: And it's allowed under the Bankruptcy
21 Code.

22 MR. MURPHY: Under the contract -- under the
23 Lightsource financial agreement, Delphi could look back at GM
24 under those circumstances and say you assigned your rights
25 under that contract to us. You have no right to sue us. Under

1 a different fact pattern.

2 THE COURT: I don't follow you.

3 MR. MURPHY: Let's say, I was standing here on behalf
4 of GM and not Guide.

5 THE COURT: Right.

6 MR. MURPHY: They could -- there would be an
7 argument -- there could be an argument under the Lightsource
8 financial agreement, look, GM, you assigned all of your rights
9 to us. Our obligation is to Guide, not to you. We stepped
10 into your shoes under this master separation agreement.

11 THE COURT: I don't follow that.

12 MR. MURPHY: The point is they would -- they could
13 make the argument that their liability for the OPEB obligations
14 runs to the other contracting party, Guide/Lightsource. Delphi
15 would make that -- could make that argument in defense to
16 General Motors under the MSA.

17 THE COURT: But that's why they have this agreement
18 where Delphi says --

19 MR. MURPHY: Exactly.

20 THE COURT: -- we assume your liability. So, you
21 know --

22 MR. MURPHY: And so --

23 THE COURT: -- GM --

24 MR. MURPHY: And so General Motors paid for the OPEB
25 reimbursement liability to Guide and in turn then sued Delphi.

1 Could Delphi not use the language that I'm standing here today
2 talking about?

3 THE COURT: Absolutely. They covered --

4 MR. MURPHY: To defend itself.

5 THE COURT: GM covered --

6 MR. MURPHY: No. It would say to GM you know, you
7 don't have any rights on it. You shouldn't have paid that. It
8 was our obligation. You paid it as a volunteer.

9 THE COURT: All right. That's the -- that goes back
10 to the point that I definitely want to ask Mr. Lyons about
11 which is if I believe that there is at least an argument that
12 GM is not liable anymore, how does that affect the
13 interpretation of this contract? But leave that aside,
14 clearly, GM has contracted with Delphi in this agreement for
15 Delphi to pay these liabilities and can sue on the contract if
16 Delphi doesn't do it.

17 MR. MURPHY: What he contracted with was for Delphi
18 to assume the contracts.

19 THE COURT: Right. And to pay the --

20 MR. MURPHY: To take over, yes. To take over as the
21 contracting party.

22 THE COURT: Right.

23 MR. MURPHY: It would step into the shoes of General
24 Motors with the direct responsibility to a former Delphi
25 business unit.

1 THE COURT: Right.

2 MR. MURPHY: See, that was -- Delphi stood and said
3 we will accept responsibilities for our existing businesses and
4 we'll also accept responsibility for the previously divested --

5 THE COURT: No. I know, I got that. I'm just -- I
6 guess, I'm still -- don't see why 9.05 doesn't preclude anyone
7 other than GM from asserting those rights.

8 MR. MURPHY: To the extent that it divested business
9 units isn't a third party, perhaps by definition. Your Honor,
10 there's any number of reasons --

11 THE COURT: But why wouldn't it be a third party?

12 MR. MURPHY: It's a divested business unit of Delphi.
13 It is part of the Delphi agreement. It is by definition. So
14 the Delphi business units that were part of Delphi, Guide
15 should be, by interpretation, covered by that umbrella.

16 THE COURT: But it's not a party to this agreement.

17 MR. MURPHY: Not a signatory, no. But the definition
18 of the Delphi business itself includes Guide in this case.
19 When they were separating --

20 THE COURT: Well, wait --

21 MR. MURPHY: When General Motors was separating --

22 THE COURT: I'm sorry.

23 MR. MURPHY: -- itself from the Delphi business --

24 THE COURT: In the agreement?

25 MR. MURPHY: Yes.

1 THE COURT: Okay.

2 MR. MURPHY: The definition of Delphi Automotive
3 Systems Business, it includes all of the existing business of
4 Delphi as well as the business previously conducted by Delphi.

5 THE COURT: Okay. But that doesn't make it a party,
6 does it?

7 MR. MURPHY: It makes it by definition a part of the
8 consideration of this contract.

9 THE COURT: No. I'm just focusing on 9.05 --

10 MR. MURPHY: I understand that, Your Honor.

11 THE COURT: -- in trying to understand --

12 MR. MURPHY: And the focus -- the problem is --

13 THE COURT: where it might be ambiguous or where it
14 might be read in favor of not applying or not restricting --

15 MR. MURPHY: The problem is that there is --

16 THE COURT: -- the obligation under a 2.02(b).

17 MR. MURPHY: The problem is that 9.05, in our
18 reading, Your Honor, is contrary to the definitions, the
19 obligations and everything else.

20 THE COURT: But how? You got to walk me through
21 that. How is it contrary to the definitions?

22 MR. MURPHY: Because they have -- the Delphi
23 Automotive business that Delphi is now responsible for included
24 the LFA. It took over that contract and became directly
25 obligated to Guide. That's the difference. It's a direct

1 obligation.

2 THE COURT: Okay. But let's just work through the
3 language. "This agreement shall be binding and upon and inure
4 solely to the benefit of each party hereto" -- that wouldn't
5 apply to Lightsource -- "and their legal representatives and
6 successors" -- they're not a legal representative. Let's put a
7 pin on "successors" for a second and we'll come back to that.

8 MR. MURPHY: Right.

9 THE COURT: "And each subsidiary" -- it's not a
10 subsidiary, is it, under the definition?

11 MR. MURPHY: No. It is a divested business.

12 THE COURT: Okay. And it's not an affiliate of the
13 parties hereto so would it be a successor? I don't think it's
14 a successor 'cause it was divested before --

15 MR. MURPHY: That language is in contrast to the
16 Lightsource -- the LFA provision, the LFA provision which
17 states that the LFA is binding upon the permitted assigns to
18 this contract. So --

19 THE COURT: All right. But this doesn't say -- if
20 this said "this agreement shall be binding and upon and inure
21 solely to the benefit of each party hereto and their assigns",
22 I understand your point. But it doesn't say that.

23 MR. MURPHY: My point is -- here's my point, Your
24 Honor. Looking at the 2.02 which is the specific language in
25 the contract dealing with what was to become Delphi's

1 responsibility. Okay?

2 THE COURT: Right.

3 MR. MURPHY: They agreed specifically to assume the
4 LFA. And that contract says, specifically, if you are an
5 assign of this contract, you are bound by it. "This agreement
6 shall be binding upon the permitted assigns." They agreed
7 pursuant to the MSA to be bound by the LFA. There's a very
8 specific trail --

9 THE COURT: Well, that goes back to my question. Is
10 this really an assignment of the contract as opposed to an
11 assumption of liabilities under the contract? There's no asset
12 that's being assigned. It's just a liability.

13 MR. MURPHY: And liabilities in this case are defined
14 as including contracts.

15 THE COURT: No. They're not.

16 MR. MURPHY: And including --

17 THE COURT: They're not. They're defined as
18 obligations. There's no reference to a contract. We went
19 through that language.

20 MR. MURPHY: Okay. Again, Your Honor, I think the
21 definition of the Delphi -- here. Delphi liabilities -- on the
22 previous page, again, in the definitional section of the MSA --
23 are defined as all the liabilities of GM that are expressly
24 provided by this agreement or any ancillary agreement to be
25 transferred to and assumed by Delphi.

1 THE COURT: Right.

2 MR. MURPHY: I mean, another -- I mean, there's
3 numerous provisions of this contract whereby Delphi agreed to
4 take over this contract and become directly liable.

5 THE COURT: All right. Other than the fact that
6 Delphi is taking over liabilities, what in this provision,
7 9.05, is either ambiguous or wouldn't limit who could sue on
8 those liabilities?

9 MR. MURPHY: When a contract is assumed, as here, by
10 Delphi, the other contracting party, Guide. It's our position
11 that they are obligated directly to Guide Lightsource in this
12 case pursuant to their assumption of that contract. There's
13 the definitions of Delphi Automotive Systems Group, the
14 previously divested businesses. There's any number of things
15 that show the clear intent of the parties that because Guide
16 was a former Delphi business unit that Delphi is responsible
17 for it. Not General Motors --

18 THE COURT: Okay.

19 MR. MURPHY: -- in the first instance.

20 THE COURT: All right.

21 MR. MURPHY: That was -- GM and Delphi were going to
22 go their separate ways on those and not remain entangled like
23 this.

24 THE COURT: Okay.

25 MR. MURPHY: Thank you, Your Honor.

1 THE COURT: Thanks. Well, let me ask you the
2 question I said I'd ask you. Does it matter as far as the
3 debtors' objection, in this context, is concerned whether GM is
4 still liable to Lightsource or not?

5 MR. LYONS: Your Honor, no. I mean, I have no idea
6 why we're dancing around the issue of whether Lightsource has a
7 claim against GM. Your Honor, if you look at the bottom of
8 14.3, under their theory that there is an assignment and
9 there's nothing -- nothing indicating there's an assignment of
10 the agreement. Let's read through 14.3 'cause I think it
11 becomes really clear -- and actually kind of a silly argument
12 to suggest that they could have assigned this agreement to
13 Delphi under the terms of the LFA. It says -- and this is --
14 I'm reading from the bottom of 14.3, Your Honor, and that's --

15 THE COURT: Let me just turn to it.

16 MR. LYONS: Yeah. That's, I believe it's Exhibit B-1
17 to the Lightsource response.

18 THE COURT: Right. Okay.

19 MR. LYONS: Okay. It says "GM may assign without
20 prior consent of NewCo this agreement and any other rights."
21 Okay? So they can't just assign a right. As Your Honor
22 identified, you assign a contract, you assume a liability. So
23 if you're going to assign anything, you got to assign the
24 entire agreement. Your Honor, there's a duty to pay warrants
25 to GM under the LFA. There's a duty to have flowback

1 obligations, that Lightsource has the ability to flow back
2 employees to GM. Delphi didn't take on those obligations.
3 Delphi never got warrants. The agreement clearly was not
4 assigned. And also, Your Honor, if you look at the last
5 sentence of 14.3 -- I think this answers your question. Even
6 if there was an assignment, what the status of GM's obligations
7 are to Lightsource. It says "notwithstanding any assignment
8 permitted by this Section 14.3" --

9 THE COURT: I'm sorry, where are we now?

10 MR. LYONS: It's the last sentence of 14.3, Your
11 Honor. "Notwithstanding any such assignment permitted by this
12 Section 14.3, GM shall remain liable for all of its respective
13 obligations hereunder."

14 THE COURT: Okay.

15 MR. LYONS: But, Your Honor, going back to Section
16 9.5, Delphi and GM, very sophisticated parties -- one could
17 imagine how many teams of lawyers worked on this agreement made
18 it bell clear exactly what the Royal Indemnity Court suggested
19 to the parties to have a very clear no third party
20 beneficiaries clause. This clause is, frankly, the clearest
21 clause that I've seen when you look at the other case law. It
22 says "this MSA shall be binding and inure solely to the benefit
23 of each party hereto and nothing in the MSA" -- okay? So it
24 supersedes all the other provisions -- "express or implied" -

25 THE COURT: That was the same language in the

1 insurance case.

2 MR. LYONS: Yes, Your Honor. It's a very broad,
3 broad, clear and unambiguous no third part beneficiaries
4 clause. Because the fact of the matter, Your Honor, this was
5 an agreement -- it was an agreement between GM and Delphi.
6 This is not an atypical type of agreement in an acquisition,
7 Your Honor, where the parties just look to each other to
8 determine who has to pay and indemnify the other for certain
9 obligations. But that doesn't invite the entire world to be
10 able to sue one of the other parties in light of a no third
11 beneficiaries clause. So the intent is clear. It's
12 unambiguous. That's what the parties negotiated and that's
13 what they agreed to.

14 The Lightsource funding agreement, Your Honor,
15 there's no -- nothing in the record that Delphi ever took an
16 assignment of this agreement. Nothing. As Your Honor
17 recognized, we freely admit Delphi was on the hook for the
18 Lightsource funding to GM. And that obligation, Your Honor,
19 that obligation actually has been --

20 THE COURT: Okay.

21 MR. LYONS: -- is part of the GM global settlement
22 agreement. We've resolved all the issues pending confirmation
23 of the plan, obviously, of all the OPEB obligations including
24 those for divested businesses. So, you're right. That is
25 being resolved between GM and Delphi.

1 So, frankly, I'm just puzzled --

2 THE COURT: Can I just take a break?

3 MR. LYONS: Certainly.

4 THE COURT: Just to -- for my staff for about five
5 minutes.

6 MR. LYONS: Certainly, Your Honor.

7 THE COURT: Okay. Thanks.

8 (Recess from 11:36 a.m. until 11:49 a.m.)

9 THE COURT: Okay. We're back on the record in
10 Delphi, and you can go ahead, Mr. Lyons.

11 MR. LYONS: Your Honor, I really have nothing more to
12 say. You know, again, we believe the clear and unambiguous
13 language of 9.04 precludes any kind of claim from Lightsource
14 directly against Delphi with respect to the OPEB, The
15 Lightsource OPEB liability.

16 THE COURT: Okay. Thank you. I actually -- I had a
17 question of you, Mr. Murphy.

18 MR. MURPHY: Yes, Your Honor.

19 THE COURT: I want to make sure I understand this
20 point. In your supplemental filings that came in the other
21 day, you referenced the -- I'll find it just a second, sorry.
22 Here it is. The EM agreement that's attached to -- the US
23 employee matters agreement --

24 MR. MURPHY: Yes.

25 THE COURT: -- that's attached to Exhibit -- as an

1 exhibit to that supplemental response.

2 MR. MURPHY: Yes.

3 THE COURT: And you say that, you know, leaving aside
4 any issues as to whether 9.05 of the master separation
5 agreement does or doesn't limit third party's right to assert
6 claims under the master separation agreement, Lightsource would
7 have a claim under the EM agreement that's not limited by the
8 no third party beneficiaries provision of that agreement,
9 paragraph 14, and I just want to make sure I underst -- what's
10 the basis for that argument?

11 MR. MURPHY: The employee matters agreement
12 relates -- as defined in paragraph 3.a, relates to all
13 employment-related responsibilities, obligations or liabilities
14 of GM regardless of when incurred. And payment of OPEB
15 obligations are part of what I would -- would be characterized
16 as all employment-related obligations.

17 THE COURT: Right.

18 MR. MURPHY: And the Delphi-terminated employees are
19 defined as those employees who are -- used to be part of Delphi
20 prior to the date of the agreement.

21 THE COURT: Right.

22 MR. MURPHY: So under that employee matters
23 agreement, they agreed to become obligated to those employees.
24 I mean, the word --

25 THE COURT: Okay.

1 MR. MURPHY: -- the language used in here isn't just
2 liabilities. They're assuming obligation.

3 THE COURT: But why -- but you go on to say that
4 paragraph 14 doesn't limit that, the no third party
5 beneficiaries language.

6 MR. MURPHY: Well, could they not stand as and be
7 employees or third parties? They didn't sign this agreement, I
8 don't have to pay them either? I don't have to pay anything.

9 THE COURT: Well, no, because there's a specific
10 exception in 14 which says that provided that any rights to be
11 provided under the Delphi employee benefit plans or their
12 successors pursuant to this EM agreement in the attached
13 schedule shall be enforceable by the participants thereunder.
14 So there is an exception for people who are participants in the
15 Delphi employee benefit plan.

16 MR. MURPHY: Right, and, Your Honor, the point I
17 wanted about to make about the EMSA and LFA is that, you know,
18 it's not just liabilities but it's obligations. That's a word
19 that's used; it means something else, and what was the
20 obligation? It was the obligation to pay to the other party.
21 Here, the other thing, there is a basis for -- on a different
22 matter, for Guide to make a claim against Delphi. That would
23 be for under a noncompete clause, for example. In 2.02, on the
24 matters of divested businesses, there is an express agreement
25 by Delphi to honor any noncompete provisions by GM entered into

1 with these former divested units. So if it violated a
2 noncompete clause it could be -- it would have -- could be
3 liable to Guide.

4 And that is contemplated also in the LFA between
5 Guide and GM. It's -- the assignment provision says GM can
6 assign this to any Delphi --

7 THE COURT: But is that -- does the proof of claim
8 cover noncompete breach?

9 MR. MURPHY: It's the intent of the parties whether
10 there was an obligation directly by Delphi to Guide.

11 THE COURT: No, but I'm just focusing --

12 MR. MURPHY: The argument is not related to the
13 claim; it's related to the interpretation of the contract. And
14 the point was GM had the ability to give -- to assume -- have
15 Delphi assume the obligations and liabilities of the LFA
16 provided that Delphi also agreed to the noncompete clause that
17 was in the LFA, and it did do that in Section 2.02. There is
18 an agreement by Delphi to honor noncompete clauses entered into
19 by GM.

20 THE COURT: I mean, not specifically but by
21 implication.

22 MR. MURPHY: Specifically.

23 THE COURT: 2.02 doesn't refer to noncompete clauses,
24 does it?

25 MR. MURPHY: I apologize, Your Honor, you're correct.

1 That is in the Delphi -- definition of what is a Delphi
2 liability, and it includes covenants not to compete entered
3 into by GM prior to the contribution date.

4 THE COURT: Okay, but I don't -- I'm just focusing on
5 this one argument that was made in the supplemental response
6 filed the other day, which that, leaving aside the master
7 separation agreement --

8 MR. MURPHY: Okay.

9 THE COURT: -- the employee matters agreement gives
10 Lightsource the ability to have a claim against Delphi.

11 MR. MURPHY: Correct.

12 THE COURT: And why doesn't the no third party
13 beneficiaries provision of that agreement similarly say that,
14 although Delphi may have an obligation or a liability under the
15 EM agreement, that only the signatories and participants in the
16 Delphi employee benefit plans have the right to assert any
17 remedies with respect to employment compensation benefits or
18 other terms and conditions of any persons? Why wouldn't that
19 similarly mean that Lightsource would not have a direct claim
20 against Delphi?

21 MR. MURPHY: The participants of that agreement are
22 Delphi-terminated employees, which are defined as
23 Guide/Lightsource employees.

24 THE COURT: But that's not --

25 MR. MURPHY: And if it's -- if they are assuming --

1 THE COURT: I'm sorry, the employees are defined --

2 MR. MURPHY: -- Delphi didn't pay those employees
3 these OPEB obligations; Lightsource/Guide had to pay them. So
4 under the EM agreement, they're obligated to make those
5 payments and they did not do so, so that's the claim, the
6 direct claim. There's -- they failed to honor their obligation
7 under the employee matters agreement to the Delphi-terminated
8 employees who have --

9 THE COURT: Well, but -- okay, let's go back and look
10 at the defined term, Delphi employee benefit plans. Does that
11 cover the OPEB liability?

12 MR. MURPHY: Which provision are you referring to,
13 Your Honor?

14 THE COURT: Well, in Section 14 -- or paragraph 14,
15 it has this exception for participants in the uppercase Delphi
16 Employee Benefit Plans.

17 MR. MURPHY: It's at 10.a.

18 THE COURT: Okay.

19 (Pause in proceedings)

20 THE COURT: Okay.

21 MR. MURPHY: The Delphi benefit plans cover the
22 provisions of benefits to employees of divested units.

23 THE COURT: Right.

24 MR. MURPHY: And, again, Lightsource and Guide are
25 divested units.

1 THE COURT: All right. But is Lightsource a
2 participant in those plans?

3 MR. MURPHY: I don't know if there's a definition of
4 participant, Your Honor. There's, again, an obli --

5 THE COURT: It's not a defined term but, I mean, it
6 isn't, is it?

7 MR. MURPHY: What Delphi is responsible for --
8 responsible for payment for the divested plans.

9 THE COURT: But the participants are the former
10 employees.

11 MR. MURPHY: To which Guide/Lightsource had to pay
12 based on Delphi's failure to pay. So they've got an obligation
13 that -- to Guide/Lightsource because they failed to pay those
14 -- I mean, Guide/Lightsource is responsible directly for those
15 employees, and then now looking to Delphi to reimburse those
16 costs because they failed to honor the employee matters
17 agreement. And its only exception to that is to the extent the
18 parties are unable to arrange with an applicable third party,
19 such as a buyer of a divested unit for a direct payment of
20 benefits. That's not the case here. It was not -- GM was not
21 unable to assign those obligations; it did. It dealt with
22 those obligations with the Guide divestiture in the LFA and it
23 transferred them to Delphi.

24 THE COURT: Okay. Mr. Lyons, what's your response to
25 that point?

1 MR. LYONS: Your Honor, Lightsource isn't a
2 participant. I mean, if there is some -- they participate in
3 the Delphi benefit plans, that's what 10.a says, and moreover,
4 if you look further down, Your Honor, it says that the parties
5 would arrange for a third party provider, but if they couldn't,
6 then Delphi would agree to reimburse GM for any amounts.

7 So, again, that goes back to the two-party nature of
8 the agreement that GM -- that Delphi would give GM a
9 reimbursement for any amount. So, you know, Your Honor, I
10 don't think there's any way to distinguish. I mean, again, the
11 no third party beneficiaries clause is still -- does not give
12 any other party -- there's -- you know, there's nothing that --
13 in the record that Lightsource is a participant, and therefore,
14 you know, that does not constitute a basis to show there's some
15 direct claim Lightsource has against Delphi.

16 THE COURT: Well, what if -- I mean, if Lightsource
17 paid on their behalf, wouldn't they be subrogated?

18 MR. LYONS: Well, Your Honor, I mean, they may have
19 their other plans. I mean, again, the obligation, as this
20 shows, between -- that GM and Delphi agree was to reimburse GM
21 for that amount.

22 THE COURT: But that's only if they're unable to
23 arrange with an applicable third party for direct payment.

24 MR. LYONS: Right, Your Honor. I think what
25 Lightsource is asserting here in this case, our OPEB rights

1 accrued under Lightsource's benefit plans. It's not what was
2 accruing under -- or which qualified to be paid under Delphi's
3 benefit plans, so there's the distinction there. Lightsource
4 has brought a claim on behalf of Lightsource under its benefit
5 plans.

6 THE COURT: But this paragraph 10.a says the Delphi
7 benefit plan shall also cover the provision of benefits for
8 employees of divested units, which were formerly Delphi
9 operations to the extent that the GM benefit plans cover the
10 provision of benefits for such divested employees as of the
11 effective time. And then there's another exception for certain
12 divested employees who've retired before the effective time.

13 MR. LYONS: But, Your Honor, if you look at that,
14 though, they speak in terms of the GM benefit plans. At the
15 time of the spin-off, Lightsource had the -- or prior to the
16 spin-off actually, the GM benefit plans -- and, again,
17 Your Honor, I'm looking at just the contract here --

18 THE COURT: Right, what you're saying is the GM
19 benefit --

20 MR. LYONS: -- with The Lightsource.

21 THE COURT: -- the GM benefit plans do not cover the
22 provision of benefits for such divested employees because
23 that's really a separate thing, that's The Lightsource benefit
24 plans covering --

25 MR. LYONS: Right, who have retired from GM, right,

1 before October 1, 1999, which is the date of the divestiture.

2 THE COURT: Well, that -- I thought -- is that a
3 different -- let me walk through this with you. Parsing
4 through this sentence, the Delphi benefit plan shall also cover
5 the provision of benefits for employees of divested units which
6 were formerly Delphi operations. So far that would apply to --

7 MR. LYONS: Right.

8 THE COURT: -- to The Lightsource OPEB, to the extent
9 that the GM benefit plans cover the provision of benefits for
10 such divested employees. Now, you're telling me that the GM
11 benefit plans don't cover Lightsource's employees because they
12 had their own plan?

13 MR. LYONS: You know, Your Honor, I mean, I'm looking
14 at the document. I'm going through the language along with
15 you.

16 THE COURT: Right, well, let's look at the definition
17 of GM benefit plans, which doesn't jump out. Have you all been
18 able to find where GM benefit plans is defined?

19 MR. LYONS: Your Honor, it might be helpful to look
20 at their claim, The Lightsource's claim.

21 THE COURT: Yeah? Okay.

22 MR. LYONS: And this might clarify why these claims
23 don't come through the Delphi employee benefit plans.

24 THE COURT: Okay.

25 MR. LYONS: And I refer you to page -- that's

1 actually the first summary page of the proof of claim, which is
2 attached --

3 THE COURT: Right.

4 MR. LYONS: -- to the supplemental response.

5 THE COURT: Right.

6 MR. LYONS: It says pursuant to Section 6.71(d) of
7 the LFA, Lightsource agreed to provide certain of its employees
8 GM-comparable post-employment retiree health, life insurance
9 benefits.

10 THE COURT: Okay. So that was a Lightsource --

11 MR. LYONS: Exactly.

12 THE COURT: -- obligation.

13 MR. LYONS: And pursuant to Section 6.71(e) of the
14 LFA, GM agreed to reimburse Lightsource annually for a portion
15 of that cost of the OPEB obligations.

16 THE COURT: So, again, then, you are saying that this
17 language, to the extent that the GM benefit plans cover the
18 provision of benefits for such divested employees would not --
19 would take The Lightsource -- would not -- that would take this
20 definition -- it wouldn't apply to The Lightsource people?

21 MR. LYONS: Yes.

22 THE COURT: And then I guess you're also -- were you
23 also saying something else, which is that -- then goes on,
24 except that the GM benefit plans, to the extent applicable,
25 will continue to cover such divested employees who have retired

1 from GM on or before the effective time or for our employees on
2 or before October 1, 1999. So --

3 MR. LYONS: So GM would keep those.

4 THE COURT: But if someone ret -- but if for some
5 reason The Lightsource employees were covered by GM benefit
6 plans, then for retirees after those two dates Delphi would be
7 assuming that liability and giving those employees, under
8 paragraph 14, the right to sue, if in fact they were covered by
9 a GM benefit plan. I guess that's right, right? That that's
10 implicit in the narrow definition of the exception?

11 (Pause in proceedings)

12 MR. LYONS: I'm sorry, Your Honor, let me -- what was
13 the question again?

14 THE COURT: I answered it myself.

15 MR. LYONS: Okay.

16 THE COURT: The term GM benefit plan, although
17 capitalized, doesn't seem to be defined here. I think it's
18 used for the first time on page 3 in paragraph 4.a. It's not
19 in the list of defined terms.

20 (Pause)

21 MR. LYONS: Let me just look at one thing.

22 THE COURT: And it's not -- it doesn't appear to be
23 defined in the master separation agreement either.

24 (Pause)

25 THE COURT: Does anyone see where it might be

1 defined?

2 (Pause)

3 MR. LYONS: See, I guess, you know, one of the other
4 comments, Your Honor, if you look at the exclusion to Section
5 14 --

6 THE COURT: Right.

7 MR. LYONS: It says by the participants thereunder.
8 The fact that Delphi may have extended, you know, the coverage,
9 you know, to cover the provision of benefits to employees of
10 another company, that doesn't mean they're a participant in the
11 Delphi benefit plan because the Delphi benefit plan is only
12 applicable to Delphi employees.

13 THE COURT: Well, is it? I don't think that's right
14 under 10.a. 10.a says the Delphi benefit plan shall also cover
15 the provision of benefits for employees of divested units. I
16 don't know, I mean, you're saying that's not a definitional
17 provision, that's a covenant they shall also cover?

18 MR. LYONS: Yes, I mean, exactly.

19 THE COURT: You shall include them in --

20 MR. LYONS: And reimburse GM for any such amounts. I
21 mean, they're not employees of Delphi, Your Honor. It's all
22 tied into the reimbursement obligation with GM.

23 THE COURT: Well, so that the -- I guess what you're
24 saying is that these employees, these divested employees, to
25 the extent that the GM benefit plans covered them, would be

1 included contractually into or under the Delphi benefit plans?
2 They'd be beneficiaries of those plans, that was the covenant?

3 MR. LYONS: No.

4 THE COURT: No?

5 MR. LYONS: No.

6 THE COURT: Okay.

7 MR. LYONS: I mean, Your Honor, Delphi doesn't have
8 on its rolls Lightsource employees for its benefit plans.

9 THE COURT: I know, but this sentence says the Delphi
10 benefit plans shall also cover the provision of benefits for
11 employees of divested units.

12 MR. LYONS: And that goes into the GM-Delphi
13 reimbursement obligation.

14 THE COURT: Which were formerly Delphi operations.

15 MR. LYONS: It's a liability between -- that Delphi
16 did assume. I mean, no question Delphi assumed that liability
17 but it only is obligated to pay GM as a reimbursement.

18 THE COURT: Well, but let's take that -- let's walk
19 that through. There's a covenant to include them if they're
20 includable.

21 MR. LYONS: To cover the liability, to cover the
22 provision of benefits for employees. Your Honor, if you look
23 at --

24 THE COURT: Well, doesn't it --

25 MR. LYONS: If you look at the terms of paragraph 14,

1 it speaks in terms of participants.

2 THE COURT: Yeah.

3 MR. LYONS: Paragraph 10 doesn't say that employees
4 are participants in the Delphi benefit plan. And, Your Honor,
5 I'm sure if we get Delphi's, you know, benefits lawyers here, I
6 think as a matter of law you can't be a participant in the
7 Delphi benefit plan; however, clearly that Delphi is liable for
8 those benefits to GM under the reimbursement obligation. So I
9 think that's actually entirely consistent with how the MSA was
10 set up as well as the employee matters agreement.

11 THE COURT: Well, let's walk through this other
12 language here to see if that corresponds to what you're saying.
13 To the extent the parties are unable to arrange with an
14 applicable third party for direct payment of benefits or
15 transfer of obligation -- I see. So you're saying -- yeah, I
16 understand your point.

17 MR. LYONS: Yeah, I mean, it's not a participant.

18 THE COURT: It's not going to be paid through the
19 plan, then the plan trustees would ensure for the payment.
20 It's going to be paid separately as if they were part of the
21 plan but they're not.

22 MR. LYONS: Right, Your Honor, I mean there's no
23 question that a Lightsource employee -- and there's been
24 nothing to the record to show or anything in any of the
25 documents to state that a Lightsource employee is a participant

1 in a Delphi benefit plan. That's what the no party -- third
2 party beneficiaries clause speaks --

3 THE COURT: Well, but I'm not sure that's dispositive
4 because you could -- if you had agreed to make them a
5 participant, then you couldn't divest them from it by breaching
6 that agreement. But what you're really saying is that you
7 didn't agree to make them a participate in the first place.

8 MR. LYONS: No, we agreed to cover the liability
9 through the reimbursement obligation to GM.

10 THE COURT: Okay.

11 MR. LYONS: And moreover, Your Honor, that's not the
12 Light -- Lightsource is not -- has not claimed that they're a
13 participant in the Delphi benefit plan --

14 THE COURT: No.

15 MR. LYONS: -- within the definition of the --

16 THE COURT: I understand that but there's -- this
17 really just came up at oral argument.

18 MR. LYONS: Understood. But I think it's pretty
19 clear --

20 THE COURT: But what Mr. Murphy is saying is that
21 they are subrogated to participants in the plan and you're
22 saying no, they're not subrogated to participants, they're
23 not -- they never were meant to be participants and so you
24 can't be subrogated to a participant if they weren't meant to
25 be a participant in the first place.

1 MR. LYONS: Precisely, because, you know -- and,
2 again, to be a participant you have to be a Delphi employee.

3 THE COURT: Okay.

4 MR. LYONS: Anything else?

5 THE COURT: No. Do you have anything to say on that
6 particular point, Mr. Murphy?

7 MR. MURPHY: Your Honor, just briefly, the argument
8 that the only obligation would be to GM for reimbursement only
9 applies in the circumstance, as Your Honor read, if they were
10 unable to -- GM was unable to arrange with the buyer of the
11 divested unit to pay those. And so, here, Lightsource and
12 Guide did pay those employees these benefits but that doesn't
13 relieve Delphi from the obligation to pay.

14 THE COURT: But Delphi didn't arrange to do that.

15 MR. MURPHY: It says GM can arrange to do it.

16 THE COURT: But --

17 MR. MURPHY: To the extent that there's --

18 THE COURT: -- there was no arrangement, was there?

19 MR. MURPHY: In the divested --

20 THE COURT: There's no arrangement.

21 MR. MURPHY: In the divested units, you know, there
22 was a provision for GM to be responsible for OPEB to the extent
23 that these employees were employees of Delphi for a period of
24 the pro rata shares of their years worked. So that
25 reimbursement obligation, that responsibility for paying those

1 obligations at the time of the LF A was for GM, and under the
2 employee matters agreement, Delphi agreed to pay those OPEB
3 obligations to divested units.

4 THE COURT: Yeah, but that doesn't -- I guess, that's
5 a separate point you're making, then, in saying that these
6 people really should have been participants. You're just
7 saying that there's no reimbursement obligation to GM because
8 by --

9 MR. MURPHY: They're arguing that there was some
10 limitation. The only time that they had to pay GM directly was
11 if they were unable to find somebody else to pay these
12 employees, then GM would have continued to pay them, which it
13 didn't.

14 THE COURT: And what somebody else did they find to
15 pay the employee?

16 MR. MURPHY: The buyer.

17 THE COURT: What buyer?

18 MR. MURPHY: Lightsource/Guide was the entity that
19 took the asset and paid the obligations that Delphi assumed it
20 was supposed to be paid. It says --

21 THE COURT: That wasn't arranged. That's as a
22 consequence of a breach, you're saying.

23 MR. MURPHY: I think the obligation was for GM to
24 reimburse those payments, so the obligation would -- The
25 Lightsource was to make those payments. It agreed, as the

1 buyer, to make those payments.

2 THE COURT: Okay.

3 MR. LYONS: And so Delphi was obligated to --

4 THE COURT: All right.

5 MR. MURPHY: -- pay for those.

6 THE COURT: But that would -- but, again, that -- to
7 me, that just confirms the argument Mr. Lyons was making, that
8 these people are not participants in the plan; they are people
9 who are entitled to money as if they had been participants, but
10 they weren't participants.

11 MR. MURPHY: Again, Your Honor, I think that he's
12 making the argument without the -- which you said that came up
13 today, without the support of his employee benefits lawyers,
14 and I stand here --

15 THE COURT: No, but it's from the language. But if
16 you read through the language, that seems to be --

17 MR. MURPHY: It may be, Your Honor.

18 THE COURT: Well, I mean, I --

19 MR. MURPHY: I mean, I think the point is -- for
20 purposes of sufficiency, is there a question here that should
21 let this matter unfold?

22 THE COURT: But I don't see -- I mean, that's why I'm
23 giving you the chance to respond to it. It seems to me that
24 that's an entirely logical and plain meaning reading of that
25 paragraph, that there's no -- there is no alternative reading.

1 You wouldn't be going through those hoops if instead they were
2 supposed to be just folded into the plan as if they were
3 participants.

4 MR. MURPHY: They were obligated to pay those
5 benefits. They agreed to pay benefits --

6 THE COURT: Right, I agree with that.

7 MR. MURPHY: -- to Delphi employees, the Delphi-
8 terminated employees.

9 THE COURT: Right.

10 MR. MURPHY: And those terminated employees included
11 the vested --

12 THE COURT: No, I agree with all of that.

13 MR. LYONS: Okay.

14 THE COURT: I agree with all of that. Okay, all
15 right. I have before me the debtor's objection to the claim
16 asserted against them by two related entities, Lightsource
17 Parent Corporation and Guide Corporation. It's clear from the
18 parties' pleadings and remarks at oral argument that the two
19 claims together constitute one claim. If the claims were to be
20 allowed, in other words, Delphi Corporation would make one
21 payment that would cover the amount asserted without
22 duplication and the two claimants would divide up that amount
23 between themselves.

24 The claim is asserted in both liquidated and
25 unliquidated amounts as set forth in the proof of claim and

1 then in the supplemental pleadings filed by Lightsource, and
2 when I refer to Lightsource throughout I mean both Lightsource
3 and Guide.

4 In the proof of claim, Lightsource contends that it
5 entered into an agreement in September of 1998 called the
6 Lightsource Formation Agreement, or LFA, pursuant to which the
7 parties, that is, GM, General Motors Corporation, and
8 Lightsource, agreed to form Lightsource Parent Corporation to
9 which GM transferred to Lightsource certain assets described in
10 the LFA essentially comprising GM's vehicle lighting business.

11 As set forth in the proof of claim, pursuant to
12 Section 6.71(d) of the LFA, Lightsource agreed to provide
13 certain of its employees with GM-comparable post-employment,
14 that is, retiree health care and life insurance benefits, OPEB
15 obligations. And then pursuant to 6.71(e) of the LFA, GM
16 agreed to reimburse Lightsource for the portion of the cost of
17 those OPEB obligations which, again, Lightsource had agreed to
18 undertake.

19 In December of 1998, GM entered into another
20 agreement, the master separation agreement, or MSA, with Delphi
21 Corporation and other subsidiaries and affiliates of Delphi,
22 including Delphi Automotive Systems, LLC, pursuant to which GM
23 spun off Delphi, which had operated as a division of GM, and
24 related business units. That agreement, as I said before, was
25 between GM and the Delphi parties. Lightsource and Guide were

1 not a party to that agreement.

2 Pursuant to Section 2.02(b) of the master separation
3 agreement, Delphi agreed with GM to assume all liabilities of
4 GM related to the business and operations divested by the
5 Delphi Automotive Systems business. Liabilities is defined in
6 the MSA as any and all debts, liabilities, guarantees,
7 assurances, commitments and obligations, whether fixed,
8 contingent or absolute, asserted or unasserted, matured or
9 unmatured, liquidated or unliquidated, accrued or not accrued,
10 known or unknown, due or to become due, whenever or however
11 arising, including without limitation whether arising out of
12 any contract or tort based on negligence or strict liability,
13 and whether or not the same would be required by generally
14 accepted accounting principles to be reflected in financial
15 statements or disclosed in the notes thereto.

16 The assumed liabilities, for purposes of this
17 hearing, which is, as the parties have noted, a so-called
18 sufficiency hearing on the legal sufficiency on its face of
19 Lightsource's claim, would include the reimbursement liability
20 that GM undertook under Section 6.17(e) of the LFA to
21 Lightsource to reimburse Lightsource's payment of OPEB
22 obligations.

23 Section 2.02(b) had some exceptions to the
24 liabilities of divested operations that were to be assumed but
25 stated in its concluding clause, provided further, however,

1 that notwithstanding the foregoing or any other provision of
2 this agreement or any ancillary agreement, responsibility for
3 certain obligations related to certain divestitures shall be
4 allocated between the parties as set forth in Schedule I
5 hereto.

6 Schedule I to the MSA provides specifically in
7 paragraph 2 that Delphi shall assume any restructuring and
8 support payments -- excuse me, subsidies and supplements
9 relating to the businesses divested to Lightsource Parent
10 Corporation.

11 Lightsource therefore contends that, pursuant to
12 2.02(b), it may assert its claim in respect of unpaid OPEB
13 obligations, not only against GM but also against the debtors.
14 It bolsters its argument in two ways. First, it contends that,
15 pursuant to Section 14.3 of the Lighthouse (sic) formation
16 agreement, it agreed that, quote, "GM may assign without the
17 prior written consent of NewCo," i.e., Lightsource, "this
18 agreement and any or all of its rights, interests and
19 obligations hereunder to a corporation or other business entity
20 to which all or substantially all of the assets of Delphi
21 Automotive is sold or otherwise transferred, provided such
22 transferee agrees in writing to be bound by Section 11.8
23 herein," which was a noncompete provision. It contends that,
24 by the assumption of liabilities under 2.02(b), which includes
25 obligations, Delphi agreed in writing to be bound by

1 Section 11.8, although it didn't specifically do so, i.e.,
2 specifically refer to that section, and therefore that this MSA
3 agreement in general and 2.02 in particular constitutes an
4 assignment of the LFA to Delphi.

5 Secondly, Lightsource contends that, pursuant to a
6 related agreement that was entered into in connection with the
7 master separation agreement, Delphi and GM agreed that Delphi
8 would be responsible for and shall pay the liabilities and
9 expenses under the Delphi benefit plans with respect to Delphi
10 employees and further that the Delphi benefit plans shall also
11 cover the provision of benefits for employees of divested
12 units, which were formerly Delphi operations. That, arguably,
13 would cover an obligation to provide for benefits to the
14 Lightsource employees in respect of their OPEB.

15 Again, that agreement which is set forth in an
16 agreement entitled US Employee Matters Agreement was not one to
17 which Lightsource or Guide was a party but rather one between
18 GM and Delphi Automotive Systems Corporation. The paragraph
19 that I was referring to is paragraph 10.a of that agreement.

20 The debtors, for purposes of this sufficiency
21 hearing, do not dispute that Delphi assumed the OPEB liability.
22 They contend, however, that the only party who can enforce that
23 agreement, and consequently the only party with a claim against
24 Delphi, is the party to that assumption agreement, whether it's
25 the master separation agreement or the US employee matters

1 agreement, or the US employee agreement, GM. It relies for
2 that proposition primarily upon Section 9.09 of the master
3 separation agreement, which provides this agreement shall be
4 binding upon and inure solely to the benefit of each party
5 hereto and their legal representatives and successors and each
6 subsidiary and each affiliate of the parties hereto, and
7 nothing in this agreement, express or implied, is intended to
8 confer upon any other person any rights or remedies of any
9 nature whatsoever under or by reason of this agreement, except
10 for Article 5, which is intended to be for the benefit of the
11 persons provided for therein and may be enforced by such
12 persons.

13 When one turns to Article 5, one can see from it
14 that, in addition to the parties to the MSA, their legal
15 representatives and successors and assigns, the additional
16 parties referred to therein would not include Lightsource or
17 Guide but rather a limited group of indemnities who would be
18 Representatives, upper case R, of the parties and their
19 successors to this agreement.

20 In addition, in respect of the assumed obligations
21 under the US employee matters agreement, the debtors rely upon
22 Section 14 of that agreement headed No Third Party
23 Beneficiaries, which states no provision in this EM agreement
24 or in any schedule, including any attachment thereto, shall
25 confer upon any person, other than the signatories hereto, any

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1 rights or remedies with respect to the employment compensation
2 benefits or other terms and conditions of employment of any
3 persons, provided that any rights to be provided under the
4 Delphi employee benefit plans or their successors pursuant to
5 this EM agreement and the attached schedule shall be
6 enforceable by the participants thereunder.

7 The parties generally agree upon the applicable law,
8 which is, by choice of the parties under the master separation
9 agreement, the law of Delaware. They also generally agree on
10 what the law of Delaware says.

11 And finally, it is the Court's view that on the
12 applicable issues before me, the law of Delaware is consistent
13 with the general common law, including as set forth in
14 decisions by courts from other jurisdictions cited by the
15 parties interpreting the law, the common law, of those
16 jurisdictions or jurisdictions outside of Delaware.

17 The issue as framed by the parties, again, is
18 whether, pursuant to the plain and unambiguous terms of the
19 contracts at issue, the provisions of those contracts relied
20 upon by Delphi, namely 9.05 of the MSA and 14 of the employee
21 matters agreement, limit or preclude Lightsource's ability
22 directly to assert a claim based upon Delphi's assumption of
23 liabilities under those respective agreements against Delphi.

24 Lightsource contends that because it is specifically
25 referred to in the MSA and reasonably specifically referred to

1 in the employee matters agreement, that those specific
2 references, pursuant to which Delphi assumed liability for OPEB
3 obligations of Lightsource, trump the provisions of 9.05 and 14
4 of the two respective agreements. Sometimes this is referred
5 to by Lightsource as a more specific provision modifying and
6 defeating a more general provision. Sometimes it is referred
7 to as an argument based on the proposition that the more
8 specific provision must lead one to interpret the no third
9 party language to apply to others who are not specifically
10 dealt with in the contract.

11 In addition, Lightsource contends that GM assigned
12 the contract to Delphi and that, as an assignee who has
13 specifically assumed liability, Delphi is, under the common law
14 of Delaware as well as the general common law elsewhere,
15 responsible directly to Lightsource.

16 Let me address that latter point first because I
17 believe it is a red herring. Under the MSA, GM agreed with
18 Delphi that Delphi would assume liabilities to Lightsource or,
19 in the words of the proviso to Section 2.02(b), the
20 responsibility for such obligations would be allocated as
21 between the parties, i.e., GM and Delphi, to Delphi, as set
22 forth on Schedule 1.

23 It does not appear to me from reading the MSA that
24 its plain terms suggest that GM assigned the entire Lightsource
25 formation agreement, both its benefits and its burdens, to

1 Delphi. It was permitted to do either of those two things, in
2 my view, under paragraph 14.3 of the LFA, which says, again, in
3 addition, after the closing, GM may assign without the prior
4 written consent of NewCo this agreement and any or all of its
5 rights, interest and obligations hereunder. I believe that
6 what occurred here, as made clear from reading the documents,
7 is that GM assigned some of its obligations under the agreement
8 to Delphi.

9 In addition, paragraph 14.3 makes it clear that,
10 quote, "Notwithstanding any such assignment permitted by this
11 Section 14.3, GM, Guide and Lightsource shall, in each case,
12 remain liable for all of its respective obligations hereunder."
13 That's important because it has been suggested by Lightsource
14 that Delphi's interpretation of the MSA and the employee
15 matters agreement would render Lightsource remediless, i.e., it
16 would not have a claim against GM anymore for breach of the
17 OPEB reimbursement obligation in 6.7 of the LFA, and therefore
18 it would be irrational to construe the MSA as not giving it a
19 direct right against Delphi under Section 2.02(b).

20 To the contrary, it seems to me that GM and
21 Lightsource in paragraph 14.3 of the LFA made it clear that
22 GM's reimbursement obligation would survive, notwithstanding
23 even a full assignment, let alone an agreement that Delphi
24 would assume certain liabilities.

25 Consequently, it is perfectly rational to interpret

1 the MSA as providing that GM would have a claim against Delphi
2 for breach of its assumption agreement, which would be
3 triggered by the nonpayment of the obligations that GM
4 independently owes under the LFA in respect of OPEB.

5 But the key element of textual analysis here involves
6 reading, in the case of the MSA, paragraphs 2.02(b) and 9.05,
7 to determine, in fact, which paragraph limits the other. That
8 is because the case law is clear that, where two parties agree
9 that one party will assume or pay the liability of the other,
10 the party holding the original liability may have standing to
11 bring a direct claim against the assuming party, provided that
12 the parties' agreement, that is the agreement between the
13 original obligor and the assuming party, makes it clear that
14 the third party would have that right.

15 Generally speaking, under the law of Delaware,
16 reference to the specific assumption of a liability in an
17 agreement between two parties would give the party who has that
18 claim standing to sue the assuming party directly. But that
19 proposition is qualified. Where there is, however, limiting
20 language in the agreement, it would preclude such a direct
21 right. That language controls. This general proposition is
22 set forth in Royal Indemnity Co. v. Alexander Industries, Inc.,
23 211 A.2d 919, Delaware Supreme Court (1965), in which the Court
24 said, again, "standing alone without limiting language", close
25 quote. Words of assumption show an intent to benefit those who

1 have supplied materials and labor and that the promise thus
2 confers upon such parties a right of action as third party
3 beneficiaries.

4 The Court made that distinction perfectly clear in
5 the next sentence when it said we see no injustice in this
6 result, especially since the parties, had they in fact intended
7 the contrary, could easily have avoided the result by inserting
8 a few words in the bond itself to limit third party standing.

9 The cases relied upon by Lightsource in its papers
10 all stand for that general proposition, and indeed Lightsource
11 acknowledges in its supplemental response dated January 8, 2008
12 as much.

13 In discussing the debtor's reliance on Corbin on
14 Contracts, Section 777 at 25, which states if two contracting
15 parties expressly provide that some parties will be benefited
16 by performance shall have no legally enforceable right, the
17 Court should effectuate the express intent by denying the third
18 party any direct remedy. And then the supplementary response
19 goes on to state Corbin is merely restating in context the
20 principle that the specifics should govern the general. If a
21 contract by its general terms confers rights on third parties
22 but such third parties are specifically excluded, then no
23 rights should attach, which is clearly a correct statement of
24 the law and is borne out by the various cases relied upon by
25 Lightsource.

1 For example, its primary case, Caldwell Trucking PRP
2 v. Rexion Technology Corp., 421 F.3d 234 (3rd Cir. 2005),
3 involved a similar issue where there was a successor -in-assign
4 provision that stated the terms and conditions of this
5 agreement shall inure to the benefit of and be binding upon the
6 respective successors and assigns of the parties hereto,
7 provided that no person, firm or entity, other than the parties
8 hereto, their respective successors and assigns shall be deemed
9 a beneficiary of any of the representations, warranties or
10 covenants contained here.

11 The Court there noted, however, at page 18 of the
12 Lexis printout, the general boilerplate language, however, must
13 yield to the specific direction of paragraph 105, which was a
14 specific assumption of liabilities provision, that, quote,
15 "Anything contained herein to the contrary notwithstanding,
16 Pullman agrees to assume all liabilities," etcetera.

17 Obviously, that introductory clause, notwithstanding
18 anything contained herein to the contrary, would in respect of
19 the assumption vitiate or narrow the scope of the general
20 successor-in-assign provision of the agreement so that it would
21 not apply to that specific assumption.

22 Similarly, in the Ladish Company, Inc. v. Armco Inc.
23 case, from the court of appeals of Wisconsin, 514 N.W.2d 724
24 (1993), the Court found a general no third party beneficiary
25 language trumped by a provision that stated that the specific

1 obligations under the acquisition agreement to defend and
2 indemnify this, quote, "surviving companies" make the surviving
3 companies and, under the express terms of the acquisition
4 agreement, their respective successors and assigns intended
5 third party beneficiaries since the specific indemnification
6 rights went to the surviving companies, one of whom was a
7 plaintiff.

8 Again, I want to make it clear I'm dealing with cases
9 here, as I believe is appropriate, that reference the specific
10 context of assumption language in an agreement between two
11 other parties that contain no third party beneficiary language.
12 I do not believe cases pertaining to assignments of contracts
13 apply here since the entire contract was not assigned. But
14 even where an entire contract is assigned, limiting language
15 would preclude the conferring of direct liability on a third
16 party.

17 Turning to the specific language at issue, I conclude
18 that Section 9.05 is not trumped by the assumption of liability
19 provision of 2.02(a) of the master separation agreement. First
20 and perhaps most important, Section 2.0(a) (sic) -- I'm sorry,
21 (b), does not contain the similar -- or the clause or a similar
22 clause as found in the agreement that I just quoted that
23 says -- or that would say, notwithstanding any other provision
24 of this agreement. Secondly, Section 9.05 is clear on its face
25 and clearly applies on its face to all the provisions of the

1 MSA, with one specifically articulated exception.

2 It's carefully drafted. It excludes from those who
3 may benefit from the agreement assigns or -- I'm sorry, and
4 assigns. Secondly, it is worded very broadly. It states that
5 nothing in this agreement, literally the flip side of the
6 notwithstanding language that I quoted earlier, "nothing in
7 this agreement, express or implied" -- that is, it refers to
8 the express provisions of this agreement as well as any sort of
9 implied right that one might otherwise want to assert -- "is
10 intended to confer upon any other person any rights or remedies
11 of any nature whatsoever under or by reason of this agreement.

12 Almost the same language was found by the Sixth
13 Circuit in Nationwide Mutual Insurance Co. v. Home Insurance
14 Co., 150 F.3d 545, to deprive a specifically identified
15 potential beneficiary of the ability to bring a direct claim
16 under an agreement. In that case, the assumption agreement
17 provided nothing in this assumption agreement, express or
18 implied, is intended or shall be construed to confer upon or
19 give to any person, firm or corporation, other than the parties
20 hereto, any rights or remedies under or by reason of this
21 assumption agreement, or any term, provision, condition,
22 undertaking, warranty, representation, indemnity, covenant or
23 agreement contained therein.

24 Going one step further, there is another provision in
25 Section 9.05 that makes that conclusion even more clear, that

1 is, the last clause of Section 9.05 lists a specific exception
2 to the foregoing prohibition on third party reliance on the
3 express or implied terms of the agreement, and, that is, except
4 for Article 5, as I noted earlier, that exception, however, by
5 its plain terms, does not apply to Lightsource.

6 In construing the agreement as a whole, one would
7 expect that if the parties intended by their plain language to
8 include any other exception, i.e., for example, parties with
9 liabilities that would be covered by 2.02(b), they would have
10 included it in this clause, and obviously they did not.

11 The Delaware courts, as well as the courts in every
12 other jurisdiction, hold that the plain meaning of a contract
13 establishes the parties' intentions. As I noted before, the
14 Delaware courts also hold that the parties' expressed
15 intentions will govern whether a third party to the agreement
16 has direct rights under the agreement.

17 Given the unambiguous language that I just quoted, in
18 the absence of any clear rationale why that language is
19 contrary to logic or reason, and indeed, recognizing that the
20 language is consistent with an agreement between GM and Delphi,
21 that leaves Lightsource with its original direct source of
22 recovery as well as now an indirect source of recovery through
23 GM's enforcement of this agreement. I conclude that, as a
24 matter of law, Lightsource cannot assert a claim under the
25 master separation agreement.

1 A similar legal analysis pertains to the interplay of
2 paragraphs 10.a and 14 of the US employee matters agreement.
3 The no third party beneficiary provision of the US employee
4 matters agreement is also broadly worded to make it clear that
5 no provision in this EM agreement or in any schedule, including
6 any attachment thereto, shall confer upon any person, other
7 than the signatories hereto, any rights or remedies with
8 respect to -- I'll skip other terms that are irrelevant,
9 benefits of any persons.

10 Similarly, with the last clause of Section 9.05,
11 paragraph 14 also has a proviso giving certain third parties
12 rights notwithstanding the foregoing language. It says,
13 provided that any rights to be provided under the Delphi
14 employee benefit plans or their successors, pursuant to this EM
15 agreement and the attached schedule, shall be enforceable by
16 the participants thereunder. Again, if GM and Delphi
17 included -- or intended, excuse me, to exempt Lightsource from
18 the reach of paragraph 14, they knew how to do it since they
19 did it in the last clause of that paragraph for participants in
20 the Delphi employee benefit plans. Lightsource itself is
21 clearly not a participant in a Delphi benefit plan and
22 therefore would not be exempt from the reach of paragraph 14.

23 It was suggested at oral argument that conceivably
24 Lightsource's employees who are owed by it OPEB guaranteed by
25 GM under the MSA might fit within the proviso to paragraph 14,

1 and if in fact Lightsource paid the claims of those
2 participants or those employees, it might be subrogated to
3 them. To determine whether the plain language of the US
4 Employee -- or Master Employee Separation -- let me get the
5 title right, the US employee matters agreement would support
6 such an argument in any respect, one has to turn to paragraph
7 10.a. Having read that paragraph, I conclude to the contrary
8 that its plain language actually confirms that the only logical
9 reading of the exception to paragraph 14 excludes Lightsource
10 and its present and former employees or those pursuant to which
11 Lightsource in the LFA agreed to pay OPEB obligations.

12 Paragraph 10.a states Delphi shall pay the
13 liabilities and expenses under the Delphi benefit plans with
14 respect to Delphi employees. Then it goes on to state, the
15 Delphi benefit plans shall also cover the provision of benefits
16 for employees of divested units which were formerly Delphi
17 operations to the extent that the GM benefit plans cover the
18 provision of benefits for such divested employees as of the
19 effective time. It then states some exceptions to that, which
20 I believe are, for purposes of this matter, irrelevant.

21 Then it states, to the extent the parties, i.e., GM
22 and Delphi, are unable to arrange with an applicable third
23 party, such as a buyer of a divested unit, for direct payment
24 of benefits or transfer of obligation, Delphi agrees to
25 reimburse GM for any such amounts.

1 Reading that language pursuant to its plain terms, it
2 is clear to me that Delphi undertook not to include employees
3 of divested units in the Delphi benefit plans as participants
4 in that plan but rather to cover the provision of benefits to
5 them, that is, cover the payment of their benefits, including
6 OPEB, and that if it could not arrange to do so with an
7 applicable third party, such as a buyer of a divested unit,
8 i.e., Lightsource, for direct payment, it would reimburse GM
9 for any such amounts.

10 It appears clear to me, therefore, that under
11 paragraph 14's proviso, the employees owed OPEB, or former
12 employees, would not be participants, quote, "in the Delphi
13 employee benefit plans", and therefore those former employees
14 of the Delphi division before the spin-off would come within
15 the reach of the no third party beneficiaries paragraph 14.
16 And under the case law that I have described, it's clear that
17 the parties intended, pursuant to that paragraph, with no
18 countervailing intention set forth in the agreement, that,
19 while Delphi would be responsible to GM for making the payments
20 under 10.a, it would not be directly responsible to any third
21 party, including Lightsource or Lightsource's employees. And
22 consequently, the only party who can, under these
23 circumstances, assert a claim against Delphi is GM, and
24 consequently Lightsource and/or Guide may not do so.

25 For those reasons, I'll grant Delphi's objection to

1 the claims filed by Lightsource and Guide. So, Mr. Lyons, you
2 can submit an order to that effect.

3 MR. LYONS: Thank you, Your Honor, I will. I don't
4 think there are any further matters, Your Honor.

5 THE COURT: Okay, thank you.

6 MR. LYONS: Thank you.

7 THE COURT: Let me say, and you've heard it too, that
8 when I give a long bench ruling, I review it. I review the
9 transcript and I may edit it. It may become an attachment as
10 edited or I may be satisfied with the ruling itself, but the
11 ruling won't change, just the words in the ruling may change,
12 as frequently happens when you give an oral ruling. You'd
13 rather -- it reads somewhat differently, and that may be the
14 case here, but the gist of the ruling won't change.

15 MR. LYONS: Thank you, Your Honor.

16 (Whereupon these proceedings were concluded at 1:13
17 p.m.)

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6 Debtors' objections to claims filed by

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7 Lightsource and Guide Corporation granted

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C E R T I F I C A T I O N

I Lisa Bar-Leib, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

January 15, 2008

Signature of Transcriber

Date

Lisa Bar-Leib
typed or printed name